

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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IN THE UNITED STATES OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CASE No. 03-1376  
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NATIONAL SCIENCE AND TECHNOLOGY NETWORK, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

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ON APPEAL OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
—————

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES:**

### **(A) Parties and Amici:**

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief for Appellant.

### **(B) Ruling Before The Court:**

*In the Matter of Licenses of National Science and Technology Network, Inc.*,  
18 FCC Rcd 19870 (2003) (JA 259).

### **(C) Related Cases:**

The order on review has not previously been before this Court. Counsel are not aware of any other related cases before this or any other court.



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## GLOSSARY

AFR	Application for Review
FCC or Commission	Federal Communications Commission
kHz	kilohertz
MHz	megahertz
MRA	Mobile Relay Associates
NSTN	National Science and Technology Network, Inc.
NSTN Petition	Petition for Reconsideration (JA 98)
<i>Order on Further Reconsideration</i>	<i>In the Matter of Licenses of National Science and Technology Network, Inc.</i> , 17 FCC Rcd 11133 (2002) (JA 183)
<i>Order on Reconsideration</i>	<i>In the Matter of Licenses of National Science and Technology Network, Inc.</i> , 16 FCC Rcd 18719 (2001) (JA 132)
<i>Order on Review</i>	<i>In the Matter of Licenses of National Science and Technology Network, Inc.</i> , 18 FCC Rcd 19870 (2003) (JA 259)
PLMR	Private Land Mobile Radio

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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**STATEMENT OF ISSUE PRESENTED**

National Science and Technology Network, Inc. (“NSTN”) applied for and was granted nine licenses by the Public Safety and Private Wireless Division (the “Division”) of the Wireless Telecommunications Bureau of the Federal Communications Commission (“FCC” or “Commission”). Under Commission rules which were in effect at the time of NSTN’s applications, NSTN was required to construct each authorized station within one year of the license grant. At the time of the grants, there was no equipment available for lawful construction of the stations. NSTN did not construct its stations within one year of the license grants, nor did NSTN seek an extension of time to construct before the expiration of the construction deadlines. The Commission thus concluded that NSTN’s nine licenses had canceled as a matter of law.

The questions presented are whether the Commission reasonably (1) applied its established policy of requiring individual licensees who desire additional time to construct their authorized stations to seek and justify an extension in their respective cases, and (2) rejected NSTN's request for a different policy that would categorically extend the construction period for all licensees whenever equipment was not available.

### **STATUTES AND REGULATIONS**

The pertinent regulations are set forth in an appendix to this brief.

### **COUNTERSTATEMENT**

In November 1999, NSTN filed nine applications seeking authority to operate private land mobile radio ("PLMR") stations on a total of 99 channels in the 450-470 MHz and 470-512 MHz bands in the Los Angeles, California area.<sup>1</sup> On February 17, 2000, Mobile Relay Associates ("MRA") filed an informal objection opposing NSTN's applications.<sup>2</sup> The FCC's Public Safety and Private Wireless Division granted the nine applications during March and April 2000, without resolution of MRA's informal objection.<sup>3</sup> The Division did not give public notice of the grants or otherwise notify MRA that NSTN's applications had been granted.<sup>4</sup>

Pursuant to FCC rules governing the operation of PLMR facilities, NSTN had one year from the date a license was granted to construct and place in operation its authorized station. If

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<sup>1</sup> On November 12, 1999, NSTN filed Application No. D133825 (JA 1-13); on November 18, 1999, NSTN filed Application Nos. D134193 (JA 14-27), D134194 (JA 28-38), D134195 (JA 39-49), D134196 (JA 50-62), and D134197 (JA 63-73); and, on November 22, 1999, NSTN filed Application Nos. D134370 (JA 74-80), D134371 (JA 80-87) and D134372 (JA 88-94).

<sup>2</sup> February 17, 2000 Letter from Mark Abrams (MRA) to Mary Shultz (FCC) (JA 95).

<sup>3</sup> See *In the Matter of Licenses of National Science and Technology Network, Inc.*, 16 FCC Rcd 18719, 18720 (¶ 2) (2001) ("*Order on Reconsideration*") (JA 133).

<sup>4</sup> *Order on Reconsideration*, 16 FCC Rcd at 18720-21 (¶ 4) (JA 133-34).

NSTN failed to meet that deadline, the license would cancel automatically, without any action by the Commission.<sup>5</sup> The FCC rules provide, however, that a licensee may avoid the automatic cancellation of its license by filing, before expiration of the construction period and automatic cancellation, a request for extension of time to commence service.<sup>6</sup>

Having learned of the Division's March and April 2000 grants of NSTN's applications, on June 30, 2000, MRA filed a petition for reconsideration that urged the Division to set aside the license grants.<sup>7</sup> In June 2001, before the Division acted on its petition for reconsideration, MRA filed a request for cancellation of NSTN's licenses based on NSTN's alleged failure to construct its stations before the one year deadline.<sup>8</sup>

On October 19, 2001, the Division granted in part MRA's petition for reconsideration.<sup>9</sup> First, in the absence of any contrary information, the Division accepted "MRA's representation that it did not learn of the grants until June 2000," and thus it concluded that MRA's petition for reconsideration was timely. *Order on Reconsideration* ¶ 4 (JA 134). On the merits, the Division found that six of the nine licenses at issue "should not have been granted" because "the [underlying] applications were defective." *Id.*, ¶ 7 (JA 134-35). In those six applications, NSTN proposed to operate on frequencies offset 6.25 kHz from regular 450-512 MHz channels with a

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<sup>5</sup> 47 C.F.R. § 90.155(a) provides, in pertinent part: "All stations authorized under this part, . . . must be placed in operation within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission."

<sup>6</sup> 47 C.F.R. § 90.155(g).

<sup>7</sup> Petition for Reconsideration (JA 98).

<sup>8</sup> June 19, 2001 Letter from Lorretta K. Tobin (MRA) to D'wana Terry (FCC) (JA 114).

<sup>9</sup> *In the Matter of Licenses of National Science and Technology Network, Inc.*, 16 FCC Rcd 18719 (2001) ("*Order on Reconsideration*") (JA 132).

bandwidth of 11.3 kHz; however, the applicable rules limit the bandwidth for operations on such offset channels to 6 kHz. *Id.* (JA 135). The Division thus set aside its grant of the six licenses and returned the underlying applications to pending status so that they could be dismissed.<sup>10</sup> *Id.* (JA 135).

With respect to the remaining three licenses at issue, the Division concluded that those licenses had canceled as a matter of law because (1) NSTN did not construct the authorized stations by March and April 2001, as required, and could not have put those stations into lawful operation because the necessary equipment was not yet available; and (2) NSTN had not sought any extension of the construction period.<sup>11</sup> *Order on Reconsideration* ¶ 8 (JA 135). Because the three licenses already had canceled, the Division dismissed as moot the remainder of MRA's petition for reconsideration of the license grants, and likewise dismissed MRA's informal objection and its request for license cancellation. *Order on Reconsideration* ¶ 9 (JA 135-36).

NSTN then sought reconsideration from the Division of its *Order on Reconsideration* and, for the first time, made an informal request for an extension of time in which to construct the stations that had been authorized under the licenses the Division had either set aside or deemed canceled.<sup>12</sup> In addition, NSTN asked the Division to consider granting a blanket extension of time to construct the facilities required by a license in cases where the necessary equipment is unavailable,<sup>13</sup> arguing that the established Commission policy of "automatic

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<sup>10</sup> The six license grants set aside were for stations WPPY931, WPPZ712, WPPY935, WPPZ716, WPPZ719 and WPPY937. *Order on Reconsideration* ¶ 1 n.4 (JA 132).

<sup>11</sup> The three licenses that the Division found had canceled automatically were for stations WPPZ660, WPPZ661 and WPPZ662. *Order on Reconsideration* ¶ 1 n.5 (JA 132).

<sup>12</sup> *Petition for Reconsideration of Order on Reconsideration Issued Under Delegated Authority* (JA 137).

<sup>13</sup> *Id.* at 13 (JA 149).

cancellation of licenses is improper.”<sup>14</sup> The Division denied the petition for reconsideration after determining that NSTN had not raised any new facts or arguments that warranted reconsideration.<sup>15</sup>

Next, NSTN sought review from the Commission of the Division’s actions and renewed its request that the Commission grant an automatic, blanket extension of construction deadlines whenever equipment necessary for lawful station construction is not readily available.<sup>16</sup> In seeking reversal of the Division’s actions, NSTN argued that the Division had erred by (1) accepting and then granting in part MRA’s petition for reconsideration because the petition was not timely; (2) setting aside its grant of the six licenses beyond the 30-day reconsideration period; (3) taking action to set aside the grants without providing NSTN with notice and an opportunity for hearing; and (4) setting aside the grants instead of modifying the licenses to cure any defects in the underlying applications.<sup>17</sup>

The Commission did not address the merits of NSTN’s arguments because it determined that the application for review was moot as to the six licenses.<sup>18</sup> On review, the Commission concluded that all of the underlying licenses had canceled as a matter of law because NSTN neither had constructed the authorized stations within one year of license grant nor, prior to

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<sup>14</sup> Petition for Reconsideration of Order on Reconsideration Issued Under Delegated Authority at 17 (JA 153).

<sup>15</sup> *In the Matter of Licenses of National Science and Technology Network, Inc.*, 17 FCC Rcd 11133 (2002) (“*Order on Further Reconsideration*”) (JA 183).

<sup>16</sup> Application for Review at 12-13 (JA 192).

<sup>17</sup> *Id.* at 4-12 (JA 195-203).

<sup>18</sup> *In the Matter of Licenses of National Science and Technology Network, Inc.*, 18 FCC Rcd 19870 (2003) (“*Order on Review*”) (JA 259).

expiration of the applicable construction periods, sought an extension of time to construct and commence service. *Order on Review* ¶ 8 (JA 262). As such, the Commission found that even if it were to determine on review that the Division's actions were erroneous, it was "unable to grant NSTN the relief it seeks: the restoration of active licenses for the captioned stations." *Id.* ¶ 9 (JA 263). The Commission further explained that "[a] party may not seek to extend an authorization it no longer has." *Id.* ¶ 8 (JA 262). The Commission additionally concluded that NSTN's request for an automatic, blanket extension of construction deadlines "has no basis in equity or policy because NSTN and other applicants could have waited until equipment was available before they filed their applications, or could have filed timely requests to extend their construction periods." *Id.* ¶ 8 (JA 262). Thus, the Commission dismissed the application for review as moot. This appeal followed.

### **SUMMARY OF ARGUMENT**

NSTN took no timely action to avoid the automatic cancellation of its licenses pursuant to Section 90.155 of the Commission's rules. While NSTN could not have constructed the authorized stations within one year of license grant because it lacked the necessary equipment to operate lawfully, NSTN could have attempted to save its licenses by filing a request for an extension of time to construct. Pursuant to Section 90.155, NSTN was required to file the extension request prior to the end of the construction period, or the license would cancel at the construction deadline without any action by the Commission. It is undisputed that NSTN did not make any request for an extension of time until well after its licenses already had canceled by the express terms of Section 90.155 of the Commission's rules.

When NSTN finally did make an extension request after the automatic cancellation of its licenses, it did not make any showing for waiver of Section 90.155, and did not offer any excuse

for its failure to file its extension request before its licenses canceled in March and April 2001. Instead, NSTN asked the Commission to change its policy from requiring construction (or an extension request) within one year of license grant, to automatically extending construction deadlines when necessary equipment is not available, even without a specific, individual licensee request. NSTN requested this change in Commission policy without offering any reason why it (or any similarly situated licensee) could not comply with the construction rules already in place. The Commission therefore acted reasonably when it denied NSTN's request that the Commission retroactively establish an automatic extension of its construction deadlines, and dismissed NSTN's application for review as moot in view of its undisputed finding that the underlying licenses had canceled as a matter of law.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court must affirm the *Order on Review* unless NSTN demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>19</sup> Under this deferential review standard, the Court does not prefer its own “judgment to that of the Commission,” but requires only that the Commission “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and choice made.’”<sup>20</sup>

NSTN faces particularly heavy burdens here because NSTN challenges the Commission's interpretation of its own rules and, to some extent, the Commission's refusal to

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<sup>19</sup> 5 U.S.C. § 706(2)(A).

<sup>20</sup> *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004), citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (further citation omitted).

waive those rules. The Court must give the Commission's interpretation of its rules "controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>21</sup> Further, the Court may not set aside the Commission's refusal to waive its rules unless NSTN establishes that "the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion."<sup>22</sup>

**II. THE COMMISSION REASONABLY REQUIRED NSTN TO FILE A TIMELY REQUEST FOR AN EXTENSION OF TIME TO CONSTRUCT THE AUTHORIZED STATIONS IN ORDER TO AVOID THE AUTOMATIC CANCELLATION OF ITS LICENSES.**

Pursuant to Section 90.155(a) of the Commission's rules, NSTN was required to construct and commence service of the authorized stations within one year from the date of the license grants (*i.e.*, by March or April 2001).<sup>23</sup> It is undisputed that NSTN failed to construct the authorized stations during the one year construction period. Its licenses thus automatically canceled at the end of each respective construction period. *Order on Review* ¶ 8 (JA 262).<sup>24</sup>

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<sup>21</sup> *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1254 (D.C. Cir. 1999) (citation and internal quotations omitted).

<sup>22</sup> *Turro v. FCC*, 859 F.2d 1498, 1499 (D.C. Cir. 1988) (citation and internal quotations omitted).

<sup>23</sup> 47 C.F.R. § 90.155(a).

<sup>24</sup> *See also Order on Further Reconsideration* ¶ 8 ("NSTN does not challenge the factual basis for our action, *i.e.* that it has not constructed these stations.") (JA 186).

NSTN might have avoided the automatic cancellation of its licenses if it had filed a timely request for an extension of time to commence service, as allowed by Section 90.155(g).<sup>25</sup> It is also undisputed that NSTN did not make any request for an extension of time prior to expiration of the applicable construction periods. *Order on Review* ¶ 8 (JA 262) (“NSTN’s requests in the AFR and the NSTN Petition for an extension of time to construct the stations were made more than twelve months after the grant of the subject licenses.”).<sup>26</sup>

It was only after the Division advised NSTN that three of its licenses had canceled for failure to construct that NSTN even attempted to request an extension of time.<sup>27</sup> NSTN first made an informal request for an extension in its November 2001 petition for reconsideration of the Division’s *Order on Reconsideration*, which NSTN filed seven months after the applicable construction deadlines had passed. NSTN has never offered any excuse for its failure to file an extension request before the construction periods expired, nor did it ever seek a waiver of Section 90.155(g)’s requirement regarding the time for filing such requests.

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<sup>25</sup> 47 C.F.R. § 90.155(g) provides: “Applications for extension of time to commence service may be made on FCC Form 601. Extensions of time must be filed prior to expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to commence service is due to causes beyond its control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.”

<sup>26</sup> *See also* Brief for Petitioner at 5 (“Although NSTN did not request a stay within the one year construction period, (although it requested one later)”).

<sup>27</sup> Although the *Order on Reconsideration* deemed only three of the licenses canceled, the Commission later determined that by the time the *Order on Reconsideration* was released in October 2001, all nine of NSTN’s licenses had canceled automatically. *See Order on Review* ¶ 8 (JA 262). The *Order on Reconsideration* responded to MRA’s Petition for Reconsideration of the NSTN license grants; at the time MRA’s petition was filed in June 2000, NSTN’s licenses had not yet canceled because the construction period (or time for filing an extension request) had not expired.

A party seeking waiver of a Commission rule such as the one-year construction deadline must show that the “underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest,”<sup>28</sup> or alternatively, that “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”<sup>29</sup> Because NSTN has not even attempted to make the required showing for waiver of the construction deadlines for its licenses, the Commission had no occasion in the *Order on Review* to discuss whether it would have granted a timely extension request under those standards.

The Commission thus correctly found that NSTN’s untimely extension request was “moot because NSTN made the request at a time when it no longer held the underlying authorization.” *Order on Review* ¶ 8 (JA 262). As the Commission explained, “[a] party may not seek to extend an authorization that it no longer has.” *Id.* (JA 262)<sup>30</sup> The Commission similarly concluded that the related application for review of the Division’s decision was moot, elaborating that “even if we were to determine that the Division erred in setting aside the license grants, it remains that the one-year construction period expired for the licenses in question” and “the licenses have cancelled automatically pursuant to the express terms of Section 90.155 of the Commission’s Rules.” *Order on Review* ¶ 9 (JA 262-63).

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<sup>28</sup> 47 C.F.R. § 1.925(3)(b)(i).

<sup>29</sup> 47 C.F.R. § 1.925(3)(b)(ii).

<sup>30</sup> *Citing In the Matter of Midport Electronics, Inc.*, 17 FCC Rcd 13778, 13782-83 (¶ 10) (2002); *In the Matter of Winstar Wireless Fiber Corp.*, 17 FCC Rcd 7118, 7123 (¶ 13) (2002).

Instead of suggesting that it made the required showing for a waiver of the Commission's rules, NSTN argues that, pursuant to Section 1.3 of the Commission's rules, there was good cause for the Commission to suspend the application of Section 90.155 to NSTN and any similarly situated licensee.<sup>31</sup> NSTN asserted before the Commission that the suspension of Section 90.155 is justified when construction is not possible because of a lack of equipment, and changing the established policy "would relieve the Commission of the burden of reviewing and acting upon filed waivers."<sup>32</sup> On that theory, NSTN requested that the Commission deem the construction period extended "to one year from the date that equipment becomes available."<sup>33</sup> As NSTN explained, the extension it proposed "would operate automatically, without the applicant requesting relief and would affect all equally;" and when "suitable equipment becomes commercially available, the Commission [could] notify all affected licensees via public notice that the construction period has begun."<sup>34</sup> The Commission rejected NSTN's request, concluding that the request "has no basis in equity or policy because NSTN and other applicants could have waited until equipment was available before they filed their applications, or could have filed timely requests to extend their construction periods." *Order on Review* ¶ 8 (JA 262). That explanation rationally explains and adequately supports the agency's decision not to grant the blanket extension of construction deadlines that NSTN requested.

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<sup>31</sup> See Brief for Petitioner at 16. Section 1.3 of the Commission's rules provides: "The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3.

<sup>32</sup> Application for Review at 13 (JA 204).

<sup>33</sup> *Id.* at 12 (JA 203).

<sup>34</sup> *Id.* at 12-13 (JA 203-04).

Although NSTN does not challenge the Commission’s finding that its licenses automatically canceled because it did not timely file an extension request, NSTN asserts that its failure should nonetheless be excused because the timely filing of an extension request would have been a futile exercise.<sup>35</sup> NSTN’s futility argument fails because, at the time NSTN was required to file its extension requests, there was no Commission precedent suggesting that it would have been futile to make a timely filing. To the contrary, the Division granted an extension request under circumstances similar to those facing NSTN, at approximately the same time that NSTN should have made its filings. In *FCI 900*,<sup>36</sup> the Division, in response to a timely request for an extension due to a lack of necessary equipment, granted a blanket extension of construction deadlines upon finding that doing so would serve the public interest and would “not undermine the Commission’s policy against spectrum warehousing.”<sup>37</sup>

NSTN ignores the Division’s order in *FCI 900*, and bases its futility argument on its reading of the Division’s October 23, 2003 order in *Hilltop*.<sup>38</sup> NSTN’s reliance on *Hilltop* is misplaced. First, the Commission cannot be held in NSTN’s case to a decision made by its

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<sup>35</sup> See Brief for Petitioner at 6 (“The Commission has indicated in NSTN’s case that even if a **timely** request would have been made within the one year construction period, the FCC still would have denied the stay.”) (emphasis in original).

<sup>36</sup> *In the Matter of FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements*, 16 FCC Rcd 11072 (2001) (“*FCI 900*”).

<sup>37</sup> *Id.*, 16 FCC Rcd at 11079 (¶ 12).

<sup>38</sup> *In the Matter of Request for Extension of Time To Construct an Industrial/Business Radio Service Trunked Station*, 18 FCC Rcd 22055 (2003) (“*Hilltop*”). See, e.g., Brief for Petitioner at 12-14.

staff.<sup>39</sup> Equally important, NSTN misreads *Hilltop*. In *Hilltop*, the Division affirmed the dismissal as moot of an untimely extension request, because the underlying license had canceled as a matter of law for failure to construct or request an extension of time within eight months of the license grant. In upholding the dismissal action, the Division noted that even if the request for a three-year extension of the construction deadline had been timely, Hilltop's assertion that it was unable to comply with the Commission's construction rules because of a lack of equipment did not support a grant of the requested extension.<sup>40</sup> The Division found that Hilltop had not made an adequate showing for a waiver of the construction requirement because Hilltop provided "no information as to how long it may take for equipment to become available," and thus the Division could not determine whether "grant of a limited waiver [of three years] in this case will provide relief to Hilltop."<sup>41</sup> The Division then distinguished Hilltop's request from the waiver request the Division granted in *FCI 900*.<sup>42</sup>

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<sup>39</sup> See *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1991) (Commission is not bound by subordinate level decisions); see also *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) ("We recently reaffirmed our well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions."); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 789 F.2d 26, 33 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986) (The "position of the agency's staff, taken before the agency itself decided the point, does not invalidate the agency's subsequent application and interpretation of its own regulation.").

<sup>40</sup> *Hilltop*, 18 FCC Rcd at 22057 (¶ 8) ("Hilltop argues that it could not comply with Section 90.155(a) because no mobile equipment was available that complied with a condition placed on this license. We find this reason alone, however, is insufficient to allow Hilltop to hold the spectrum until equipment finally becomes available.") (footnote omitted).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

NSTN's futility argument also fails because it is not enough for NSTN to show on appeal that NSTN's extension request would have been denied.<sup>43</sup> Finally, even if the Division's order in *Hilltop* were binding on the Commission itself and could be read as NSTN suggests, that order still would have no bearing on NSTN's purported belief that it would have been futile to file its extension requests at the time they were due in March and April 2001. The *Hilltop* order was not released until October 23, 2003 – more than two and a half years after NSTN's construction deadlines had passed; two years after the Division's *Order on Reconsideration*; and a year after the Division's *Order on Further Reconsideration*.<sup>44</sup> As NSTN itself notes, *Hilltop* was not even released until a month after release of the *Order on Review*,<sup>45</sup> and thus could not have limited the FCC's discretion in resolving this case.

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<sup>43</sup> See *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 183 (D.C. Cir. 1997) (futility cannot be established by the Commission's position on appeal); see also *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409, 413 (D.C. Cir. 1998) ("Doubt about the success of prosecuting an administrative appeal is no reason to excuse a litigant's failure to make the attempt.") (citations omitted).

<sup>44</sup> The *Order on Reconsideration* was released October 19, 2001, and the *Order on Further Reconsideration* was released June 19, 2002.

<sup>45</sup> See Brief for Petitioner at 10 ("NSTN's MO&O which is the subject of this appeal was released just one month earlier!"). The *Order on Review* was released September 26, 2003.

**CONCLUSION**

For the reasons above, the *Order on Review* should be affirmed.

Respectfully submitted,

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## **STATUTORY APPENDIX**

### Contents:

47 C.F.R. § 1.925  
47 C.F.R. § 90.155

**CODE OF FEDERAL REGULATIONS TITLE 47--TELECOMMUNICATION CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION SUBCHAPTER A--GENERAL PART 1--PRACTICE AND PROCEDURE SUBPART F--WIRELESS TELECOMMUNICATIONS SERVICES, APPLICATIONS AND PROCEEDINGS APPLICATION REQUIREMENTS AND PROCEDURES**

Current through December 3, 2004; 69 FR 70342 § 1.925 Waivers.

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words "WAIVER--EXPEDITED ACTION REQUESTED."

(c) Action on Waiver Requests.

(i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.

(ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

**CODE OF FEDERAL REGULATIONS TITLE 47--TELECOMMUNICATION CHAPTER I--FEDERAL  
COMMUNICATIONS COMMISSION SUBCHAPTER D--SAFETY AND SPECIAL RADIO SERVICES  
PART 90--PRIVATE LAND MOBILE RADIO SERVICES SUBPART G--APPLICATIONS AND  
AUTHORIZATIONS**

Current through December 3, 2004; 69 FR 70342 § 90.155

Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in sections 90.629, 90.631(f), 90.665, 90.685 and 90.1209, must be placed in operation within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

(b) A local government entity in the Public Safety Pool, applying for any frequency in this part, may also seek extended implementation authorization pursuant to § 90.629.

(c) For purposes of this section, a base station is not considered to be placed in operation unless at least one associated mobile station is also placed in operation. See also §§ 90.633(d) and 90.631(f).

(d) Multilateration LMS systems authorized in accordance with § 90.353 must be constructed and placed in operation within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission. MTA-licensed multilateration LMS systems will be considered constructed and placed in operation if such systems construct a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this section) to provide multilateration location service to a substantial portion of at least one BTA in the MTA.

(e) A multilateration LMS station will be considered constructed and placed in operation if it is built in accordance with its authorized parameters and is regularly interacting with one or more other stations to provide location service, using multilateration technology, to one or more mobile units. Specifically, LMS multilateration stations will only be considered constructed and placed in operation if they are part of a system that can interrogate a mobile, receive the response at 3 or more sites, compute the location from the time of arrival of the responses and transmit the location either back to the mobile or to a subscriber's fixed site.

(f) For purposes of this section, a station licensed to provide commercial mobile radio service is not considered to have commenced service unless it provides service to at least one unaffiliated party.

(g) Application for extension of time to commence service may be made on FCC Form 601. Extensions of time must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to commence service is due to causes beyond its control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

(h) An application for modification of an authorization (under construction) at the existing location does not extend the initial construction period. If additional time to commence service is required, a request for such additional time must be submitted on FCC Form 601, either separately or in conjunction with the submission of the FCC Form 601 requesting modification.

(i) DSRCS Roadside Units (RSUs) in the 5850-5925 MHz band must be placed in operation within 12 months from the date of registration (see § 90.375) or the authority to operate the RSUs cancels automatically (see § 1.955 of this chapter). Such registration date(s) do not change the overall renewal period of the single license.